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April 7, 2014

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VIA E-MAIL AND U.S. MAIL

Ed Shikada
City Manager
City of San Jose
200 East Santa Clara Street
San José, CA 95113
E-Mail: ed.shikada@sanjoseca.gov

Re: City's Obligation to Bargain Over Proposed Changes to Retirement Board

Dear Mr. Shikada:

It has come to the attention of our client, the San Jose Police Officers' Association (the "POA"), that the City plans to move forward with the Retirement Board governance changes recommended by Cortex Applied Research as outlined in the February 21, 2014 Memorandum from Alex Gurza to the Mayor and City Council. We write to remind the City that many of the proposed changes are within the scope of bargaining and the City would normally have an obligation to negotiate in good faith with the SJPOA **before** moving forward with these proposed changes.

City Charter Section 1111 requires the City to "negotiate in good faith with the recognized fire and police department employee organizations on all matters relating to the wages, hours, and other terms and conditions of City employment" The City Charter mirrors California's Meyers-Milias-Brown Act in this respect, which requires that public employers "meet-and-confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of ... recognized employee organizations ... prior to arriving at a determination of policy or course of action." (Cal. Govt. Code §3505.) Unlike the MMBA, however, Section 1111 goes further and provides that any impasse in negotiations between the City and its police and fire unions must be resolved through a binding arbitration process.

As evidenced by the history of bargaining over the makeup of the Retirement Board, the structure and composition of the Retirement Board as a mandatory subject of bargaining should be undisputed. In 1999, for instance, the City, IAFF, Local 230,

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and the POA negotiated over the addition to the Retirement Board of both a retired police officer/fire fighter and a member of the City Administration with, as the City phrased it, "some fiscal background." Indeed, those negotiations culminated in a written agreement entitled "Agreement—Negotiations Regarding Composition of Police and Fire Retirement Board." This "Agreement" increased the Board from five to seven members by adding the aforementioned police/fire fighter retiree and representative from the City Administration, specified the terms of the new members and their respective qualifications, along with the procedures by which any vacancy in their positions would be filled, and set forth a detailed process for selection of the police/fire retiree Board member. On the City's side, that Agreement was signed by then-Acting Employee Relations Manager Alex Gurza. A copy of the Agreement is enclosed for your review.

The City's past recognition of the changes made to the Retirement Board as within the scope of bargaining are entirely in accord with established labor law principles on this subject. Here, a good explanation of why the composition of a public sector retirement board falls within the ambit of collective bargaining obligations can be found in a Court of Appeals decision from the State of Michigan, which held unequivocally that the composition of such retirement boards is a "mandatory subject of bargaining" that cannot be changed absent negotiations with the affected labor organizations. As the Appellate Court explained:

The powers of the Boards of Trustees are substantial and have a significant effect upon the conditions of employment. They include the power to determine whether employees are totally disabled as a result of their performance at city work so as to entitle them to the increased benefits provided under duty disability pensions. Similarly, the Boards of Trustees determine whether employees are totally disabled due to non-duty disability, entitling them to early and substantial pension benefits. ... [T]he Boards of Trustees also compute the City's contribution liability to the fund, for which the Mayor and Council must appropriate sufficient funds. Finally, the Boards of Trustees determine the investment of funds which in the long run determines the amount of benefits, amount of City contributions and amount of employee contributions.

(City of Detroit v, Michigan Council 25 American Federation of State, County and Municipal Employees (1982) 118 Mich.App. 211, 218-19.)

Having outlined the City's legal obligation to bargain over changes to the Retirement Board composition and the parties' past history of bargaining consistent with that legal obligation, we would be remiss if we did not raise the zipper clause in Article 19 of the parties' MOA, which prevents changes within matters in the scope of bargaining during the lifetime of the contract. Notwithstanding the zipper clause,

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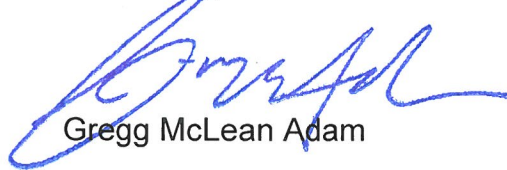
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however, the POA is open to discussing these proposed changes with appropriate representatives of the City.

If the City wishes to discuss these changes, please advise Jim Unland or the undersigned at your earliest opportunity.

Very truly yours,

CARROLL, BURDICK & McDONOUGH LLP



Gregg McLean Adam

GMA:jo

Enclosure

cc: Jim Unland, President, San Jose POA
John Robb, Vice President, San Jose POA
Franco Vado, Chief Financial Officer, San Jose POA
Alex Gurza, Deputy City Manager
Jennifer Schembri, Deputy Director Employee Relations

PROTENTATIVE AGREEMENT
NEGOTIATIONS REGARDING COMPOSITION
OF POLICE AND FIRE RETIREMENT BOARD

ORIGINAL

1. COMPOSITION

Increase Board from 5 to 7 members by adding:

- A retiree; and
- Member of the Administration (with some fiscal background) in a position of Deputy Department Head or higher

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2. TERM OF OFFICE

Retiree Representative

- Four-year term
- Person may be appointed for second term
- If the Retiree Representative position has been held by retired members of the Fire Department for any consecutive eight-year period, the next appointment shall be a retired member of the Police Department, unless no retired member of the Police Department submits a nomination petition
- If the Retiree Representative position has been held by retired members of the Police Department for any consecutive eight-year period, the next appointment shall be a retired member of the Fire Department, unless no retired member of the Fire Department submits a nomination petition

Administration Representative

- Four-year term
- Person may be reappointed for subsequent terms

3. APPOINTMENT PROCESS

Process for selection of Retiree Representative includes the following:

- Eligibility limited to retirees only (not spouses, survivors or deferred vested)
- Nomination petition signed by 10 Police & Fire retirees (Process will be similar to the process for the employee representatives.)
- Election among retirees, conducted by City Clerk's Office, to determine a retiree to be recommended for appointment in the same manner as employee members are selected.
- A panel consisting of one representative each from the POA, Local 230, and the City Manager's Office would interview the three people with the highest number of votes. The purpose of the panel is to ensure that the candidates are viable, i.e., are able to attend meetings and fulfill the time commitment required of Board members.
- Panel makes recommendation(s) to City Council. If the panel unanimously agrees on a candidate, that candidate will be the panel's recommendation. If the panel recommends a candidate by a 2-1 vote, the candidate receiving two votes will be the panel's recommendation, and the dissenting member of the panel may submit a dissenting report. If there is no agreement on a candidate to recommend to Council, each panel member may submit its written recommendation to Council.
- The results of the recommendation of the voting retirees and the panel's recommendation will be reported to the City Council.
- City Council appoints a retiree to the Board
- In response to a request from the POA and Local 230, the Council should appoint a retired member of the Fire Department as the first retiree representative

Process for Administration member:

- City Manager makes recommendation to City Council
- City Council appoints Administration member to the Board

4. MID-TERM VACANCY

Retiree Representative

- Retiree Association recommends up to three candidates to the Board
- Board interviews candidates and makes recommendation to Council
- Council appoints a retiree to the Board to complete the remainder of the term

Administration Representative

- City Manager makes recommendation to City Council
- City Council appoints an Administration member to the Board to complete the remainder of the term

5. REMOVAL PROCESS

Current Municipal Code Sections:

- 2.08.050 Board or Commission seat vacancies
- 2.08.060 Absence from meetings
- 2.08.130 Removal from office
- 2.08.140 Temporary vacancies

Amend Section 2.08.130 so that the section does not apply to members of the Board. Amend the provisions relating to the membership of the Board so that any Board member could be removed for cause.

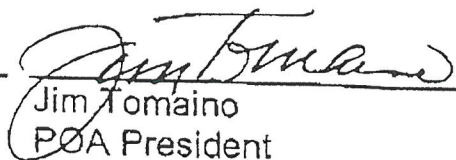
The POA, Firefighters Union or City Manager may submit a request for removal to the City Council. The request must state the grounds. The City Council would hold a hearing and if it concluded that cause for removal had been demonstrated by substantial evidence, it could remove the member.


This tentative agreement is subject to ratification of each union and approval by the City Council.

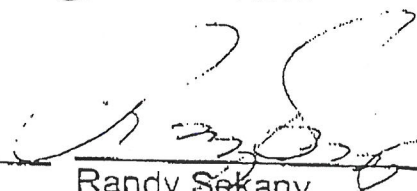
For the City:

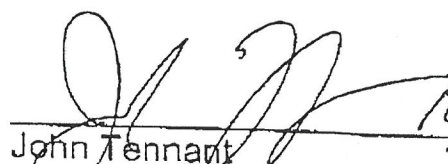

Debra J. Figone
Assistant City Manager

For the Unions:


Jim Tomaino
POA President

 10/6/99
Alex Gurza
Acting Employee Relations
Manager

 10/6/99
Randy Sekany
IAFF President, Local 230

 10/06/99
John Tennant
Counsel for POA

 10.6.99
Christopher Platten
Counsel for IAFF, Local 230